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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 907

LUIS ALVARA CEBALLOS (Y ARBOLEDA), PETITIONER

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE AT THE PORT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 2a-3a) is reported at 229 F. 2d 592. The opinion of the District Court (R. 23-27) is reported at 130 F. Supp. 30.

JURISDICTION

The judgment of the Court of Appeals was rendered on February 6, 1956. The petition for a writ of certiorari was filed on April 28, 1956. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an alien who claimed exemption from military service as a neutral in August 1943, and was not troubled by his draft board for some months thereafter until his native country became a belligerent, was debarred from citizenship under Section 3(a) of the Selective Service Act of 1940.

STATUTES INVOLVED

Section 19(c) of the Immigration Act of 1917, as amended, 62 Stat. 1206, 8 U.S.C. (1946 ed. Supp. V) 155, provided in pertinent part:

> In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * (2) suspend deportation of such alien if he is not ineligible for naturalization * * * if he finds (a) that such deportation would result in serious economic detriment to a citizen * * * who is the spouse, * * * or minor child of such deportable alien; * * *.

Section 3(a) of the Selective Training and Service Act of 1940, 54 Stat. 885, as amended, 50 U.S.C. App. (1946 ed.) 303 (a), provided in part:

> Except as otherwise provided in this Act, every male citizen and every other male person residing in the United States, who is be-

tween the ages of nineteen and forty-five * * * shall be liable for training and service in the land and naval forces of the United States: *Provided,* That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States. * * *

Section 315 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 242, 8 U.S.C. 1426, provides:

(a) Notwithstanding the provisions of section 405 (b), any alien who applies or has applied for exemption or discharge from training or service in the Armed Forces or in the National Security Training Corps of the United States on the ground that he is an alien, and is or was relieved or discharged from such training or service on such ground, shall be permanently ineligible to become a citizen of the United States.

(b) The records of the Selective Service System or of the National Military Establishment shall be conclusive as to whether an alien was relieved or discharged from such liability

for training or service because he was an alien.

Section 101(a)(19) of the Immigration and Nationality Act of 1952, 66 Stat. 169, 8 U.S.C. 1101 (a)(19), provides:

> (19) The term "ineligible to citizenship", when used in reference to any individual, means, notwithstanding the provisions of any treaty relating to military service, an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended * * *.

STATEMENT

Petitioner is an alien who last entered the United States on April 2, 1951, on a transit visa en route to Mexico with permission to stay until April 23, 1951 (R. 35). Deportation proceedings were started against him on April 23, 1951 (R. 34) during the course of which he applied for suspension of deportation on the ground of economic hardship to his American citizen wife who was then expecting a child (see R. 46-47), and subsequently on the claim of hardship to his wife and two children (R. 64-65, 71-72), whom he supported from a business of which he was president, located in the City of New York, in which he had invested before his 1951 entry into the United States (R. 51, 72, 75).

After several hearings and appeals to the Board of Immigration Appeals, he was found ineligible for suspension because ineligible for citizenship in that, in August 1943, while admitted to the United States for permanent residence, he had claimed exemption from military service as a neutral alien (R. 77-102). He was granted the privilege of voluntary departure (R. 15, 86), but failed to depart.

In March 1955, he filed in the United States District Court for the Southern District of New York an action against the District Director of the Immigration Service for a declaratory judgment declaring him to be eligible for suspension of deportation (R. 1-6) and for a temporary injunction restraining the director from taking him into custody for deportation (R. 7-16). The government moved for dismissal of the complaint for failure to join the Attorney General and failure to state a cause of action (R. 16-17), incorporating by reference the administrative record (R. 18). The District Court dismissed the complaint on the ground that the Attorney General was a necessary party (R. 23-29).[1] The Court of Appeals affirmed. While admitting that, in view of the decision of this Court in *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, there was doubt as to the validity of a distinction it had formerly drawn as to the necessity of joining the Attorney General where the issue was one of the discretion to be exercised in granting

[1] This was prior to the decision of this Court in *Shaughnessy* v. *Pedreiro*, 349 U.S. 48.

suspension, as distinguished from a finding of deportability (see *Pedreiro* v. *Shaughnessy*, 213 F. 2d 768, 769), the court nevertheless adhered to the view that the Attorney General was a necessary party where suspension of deportation was involved. It also held, however, that the District Court's decision had in any event to be affirmed because petitioner, as a matter of law, was not entitled to the relief he sought (Pet. 2a-3a).

On the issue of petitioner's ineligibility for citizenship and consequent disqualification for suspension under Section 19(c) of the Immigration Act of 1917 (as amended),[2] the following facts, shown by the administrative record, are undisputed. Petitioner, then a native and citizen of Colombia,[3] was admitted to the United States for permanent residence in February 1942 (R. 42, 65), when he was 28 years old. In May 1942, he registered under the Selective Training and Service Act. One June 16, 1943, in his personal history statement, he stated "I *do* object to service in the land and naval forces of the United States."

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[2] Since petitioner's application for suspension was made before the effective date of the Immigration and Nationality Act of 1952, it is governed by the prior Act, under Section 405 of the 1952 Act (the savings clause). Petitioner was in no position to file a new application for suspension under the 1952 Act because he did not have the minimum residence requirements necessary for suspension under that Act. The standard of the 1917 Act (as amended) of "serious economic detriment" to dependents has, under the 1952 Act, been changed to "exceptional and extremely unusual hardship."

[3] He subsequently became a citizen of Mexico (R. 55).

The word "do" was written in petitioner's handwriting (R. 42, 73). Within two months thereafter, he received DSS Form 301, entitled "Application by an Alien for Relief from Military Service". That form contains the following paragraph:

> I do hereby make application to be relieved from liability for training and service in the land or naval forces of the United States, under the Selective Training and Service Act of 1940, as amended, in accordance with the act of Congress, approved December 20, 1941. I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States. I have not filed a declaration of intention to become a citizen of the United States.

Petitioner executed the form under oath on August 26, 1943, before a selective service official (R. 42). He was then employed as a translator by the Union Carbide and Carbon Corporation (R. 42). On November 26, 1943, Colombia became a co-belligerent and petitioner's right to exemption from military service as a neutral alien terminated. In January 1944, he was classified I-A, but was subsequently rejected for service because of physical defects (R. 40, 70).

In explanation of these facts, petitioner, at the first hearing in the deportation proceedings held on July 31, 1951, stated that he went to his draft

board and "was presented with Form 301 for signature"; that it was his understanding that it was a temporary deferment until he would decide whether he wanted to serve in the Colombian or American army (R. 39-40). He admitted that before the American consulate in Mexico he had denied having signed a Form 301, but said he did so because he did not believe it was still in effect (R. 40-41). He said that when he stated in his personal history statement that "I *do* object to service in the land or naval forces of the United States" he meant he was to serve in the Colombian army (R. 43). He testified that he had talked with other Colombians and, "not being able to ask anybody in the draft board about what was the best procedure to follow" (R. 43), it was his idea that he was going to be given an opportunity to fight in a squadron originating from Latin America (R. 43).

At the reopened hearing held on January 25, 1954, petitioner testified that in May 1942, a short time after he registered, he lost his registration card and went to the draft board to get a copy and notify them of a change of address. Contrary to his prior testimony that he could not talk to anyone at the draft board, he testified at the later hearing that he discussed with the draft board the problem of serving "in a division of Colombians within the United States Army" (R. 67). After he received his personal history statement, he again discussed the problem with the draft board and inserted the word "do", as to objection to

service, "on the understanding that there were going to set this—make up this particular group" (R. 68). He testified that he did not desire relief from military service; that the Form 301 was sent to him in the mail without his request; that after receiving it he went to the draft board and again discussed the matter of his serving in a particular division of the United States Army. He said he did not understand that he was asking to be relieved from military service (R. 69-70). He could not recall with what official at the draft board he had spoken (R. 72).

The hearing officer, both after the initial hearing (R. 80-81) and after the reopened hearing (R. 82-86), found petitioner ineligible for suspension by virtue of his application for relief from service. The Board of Immigration Appeals affirmed in a lengthy opinion (R. 87-98) in which it pointed out the discrepancies in petitioner's testimony, finding that he exhibited "such a selective attitude * * * toward facts that his candidness must be questioned" (R. 95). As to the argument that there was no competent evidence that petitioner had been granted exemption from service as the result of signing Form 301, the Board of Immigration Appeals noted that the draft board did not communicate with petitioner after he filed the exemption form on August 26, 1943, until after Colombia became a belligerent on November 26, 1943, but that very soon thereafter he was called for service in January 1944. It found in this combination of facts "some evidence that he re-

ceived the exemption he applied for" (R. 96-97). On rehearing, it further pointed out that, under the applicable Selective Service Regulation, 32 C.F.R. 622.43(b), petitioner could not have been legally inducted while Colombia remained a neutral (R. 102). And, in any case, it ruled that under Section 3(a) of the Selective Training and Service Act of 1940, as amended (see *supra*, pp. 2-3), the filing of the application was itself a bar to naturalization (R. 97).

The Court of Appeals, in affirming the dismissal of petitioner's complaint for failure to state a cause of action (as well as for failure to join a necessary party), held that the making of the application for exemption as a neutral alien itself rendered petitioner ineligible to citizenship (Pet. App. 3a).

ARGUMENT

1. The government does not rely upon that aspect of the decision below which holds that the Attorney General is a necessary party to an action for a declaratory judgment seeking review of the denial of suspension of deportation. In its decision in *Pedreiro* v. *Shaughnessy*, 213 F. 2d 768, 769, holding that the Attorney General was not a necessary party to a proceeding to review an order of deportation, the Second Circuit had distinguished its prior holding in *Vaz* v. *Shaughnessy*, 208 F. 2d 70, on the ground that that case "involved an attempt by a concededly deportable alien to review an order holding him not eligible for suspension of deportation, essentially a discretionary matter",

However, as we read this Court's decision in *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, the question of indispensability of parties does not turn on the nature of the decision attacked, but on the ability and authority of the party before the court to effectuate the relief which the alien seeks. Here, petitioner seeks to have the order of deportation recalled and to enjoin the district director from taking him into custody for deportation. Since the district director is the person who would execute the deportation, we think that, under this Court's *Pedreiro* decision, he is a sufficient party. This will be the position of the government in future cases.

2. But the question of indispensability need not be reached in this case in view of the alternative holding of the Court of Appeals that, from the face of the pleadings which incorporated by reference the administrative record, it appears that "as a matter of law" petitioner is not entitled to the relief which he seeks.

(a). Actually, the particular substantive question decided by the Court of Appeals and presented by petitioner—whether an alien who filed an application for exemption under Section 3(a) of the Selective Training and Service Act of 1940 was rendered ineligible to citizenship whether or not he was actually granted exemption as a neutral alien—is also academic as raised in this case. As the Board of Immigration Appeals noted in its opinion (see Statement, *supra*, pp. 9-10), petitioner, who filed his claim to exemption on August 26,

1943, was not troubled by his draft board for the three month period before Colombia became a belligerent on November 26, 1943, but a little more than a month after that event he was classified in I-A, in January 1944. Considering the known demand for recruits in the crucial period of 1943, and the quick action of the board after Colombia's belligerency, it is evident that petitioner was in fact relieved from service because of his filing of DSS Form 301, whether or not the draft board went through the mechanics of classifying him IV-C, as to which there is no evidence in the record. Since it is admitted that if petitioner both claimed and obtain exemption as a neutral alien he was ineligible to citizenship and disqualified for suspension under the 1917 Act, petitioner, on the basis of the undisputed facts, was not entitled to the relief sought in his complaint.

(b). If it becomes necessary to reach the question of whether a neutral alien who has claimed exemption, but whose request was not acted upon, was ineligible to citizenship under Section 3(a) of the Selective Training and Service Act of 1940, we think the court below was correct in holding that the application was itself a bar to citizenship. Section 3(a) provided for the mandatory exemption from service of a neutral alien making application for relief, and then provided expressly that "any person who makes such application shall thereafter be debarred from becoming a citizen of the United States" (see *supra*, p. 3). By the terms of the statute, the *application* is the bar to

citizenship. Decisions dealing with applications for exemption under Section 3(a) have spoken, in the terms of the statute, of the bar to citizenship arising from the application, although in those cases the aliens had in fact been exempted from service for some period of time. *McGrath* v. *Kristensen*, 340 U.S. 162, 172;[4] *Machado* v. *McGrath*, 193 F. 2d 706, 710 (C.A.D.C.), certiorari denied, 342 U.S. 948; *Mannerfrid* v. *United States*, 200 F. 2d 730, 733 (C.A. 2), certiorari denied, 345 U.S. 918.

Petitioner argues (Pet. 20-24) that Section 3(a) of the Selective Service Act of 1940 must be read in the light of the subsequent provision of Section 315 of the Immigration and Nationality Act of 1952, (*supra*, pp. 3-4) which bars from citizenship an alien who has applied for exemption "*and* is or was relieved or discharged from such training or service on such ground" (emphasis added). That statute has been interpreted to require both application for *and* the obtaining of relief. *United States* v. *Bazan*, 228 F. 2d 455 (C.A. D.C.); see also *Petition of Caputo*, 118 F. Supp. 870 (E.D. N.Y.). The petition argues (Pet. 21-22) that the general reference in the legislative reports of the 1952 Act to this provision as a continuation of the policy established by the disqualification provision of Section 4(a) of the Universal Military Training and Service Act of 1948 (which so far

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[4] In the *Kristensen* case, this Court did hold that the filing of the form by one who was not liable for service at the time was not a bar to citizenship. That ruling has no application here.

as material here is the same as Section 3(a) of the 1940 Selective Service Act) requires that the earlier statute be interpreted in precisely the same manner as the 1952 Act. However, under Section 3(a) of the 1940 Act, relief from service was mandatory upon the filing of a claim for exemption by a neutral alien, and relief from service would ordinarily follow as of course upon the application for exemption (as we think happened here, *supra*, pp. 11-12). There is no indication that Congress, by the conjunctive wording of Section 315 of the 1952 Act, had in mind its possible relation to the extraordinary situation which petitioner claims exists in his case—of a proper claim for exemption which was not acted upon. Moreover, Congress specifically recognized, in the 1952 Act, the existence of Section 3(a) of the 1940 Act when it provided in Section 101(a)(19) of the 1952 Act (*supra*, p. 4) that the term "ineligible for citizenship" is defined to include "an individual who is, or was at any time, permanently debarred from becoming a citizen of the United States under section 3(a) of the Selective Training and Service Act of 1940, as amended * * *." Under these circumstances, there is no reason not to read the words of the 1940 Act, which is phrased differently from the 1952 Act, in accordance with their own plain meaning.

It is clear that Section 3(a) of the 1940 Act, not Section 315 of the 1952 Act, governs petitioner's application for suspension for deportation. In the first place, as noted above, Section

101(a)(19) of the 1952 Act defines as ineligible to citizenship one debarred under Section 3(a) of the 1940 Act. The bar of Section 3(a) continues despite the expiration of the 1940 Act. *Machado v. McGrath*, 193 F. 2d 706 (C.A. D.C.), certiorari denied, 342 U.S. 948; *Ballester Pons* v. *United States*, 220 F. 2d 399, 405 (C.A. 1), certiorari denied, 350 U.S. 830. Moreover, as noted in footnote 2, *supra*, p. 6, petitioner's claim for suspension was made prior to the effective date of the 1952 Act and must be determined under the prior law. Since petitioner did not apply for suspension under the 1952 Act (and did not have the residence requirements to do so), he cannot have his claim to eligibility for citizenship determined by the 1952 Act.

The legal question raised, even on the doubtful assumption that it would be reached in petitioner's case, has no general importance. There can hardly be many cases where a neutral alien who claimed the mandatory right to relief from service is in a position to argue that he was never, even for a short period, granted the claimed exemption. We know of no other cases which present that precise problem. Petitions for naturalization by the few aliens who may be able to claim that, although they asked for exemption, it was not granted will be governed by the provisions of Section 315 of the 1952 Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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